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No. 99-1564

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

MICHAEL MAHONEY, Warden,
Montana State Prison,
Petitioner,

vs.

WILLIAM GOLLEHON,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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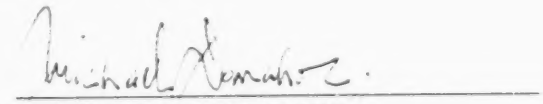
In conformity with Rule 15.8 of this Court respondent offers the following brief as a supplement to his response opposing petitioner's April 3, 2000 petition for writ of certiorari.

The Court's April 26, 2000, Decision in Slack v. McDaniel Supports Denial of Petitioner's Petition Because In The End the Ninth Circuit Used The Right Test In Granting Respondent Permission to Appeal Even Though It Did So Under The Former Version of 28 U.S.C. Section 2253.

1. The Court's recent decision on April 26, 2000, in the case styled as *Slack v. McDaniel* (No. 98-6322) makes it clear that the pertinent test for a certificate of appealability under revised 28 U.S.C. §2253(c) (when the petition is dismissed on procedural grounds) is whether the habeas petition alleges denial of a constitutional right and whether jurists of reason would find it debatable whether the district court's procedural ruling was correct.

2. Although the Ninth Circuit issued respondent a certificate of probable cause on March 1, 1999, under the former version of §2253 (*see* a copy of the certificate attached) it appears that the panel which issued that certificate followed the test set forth in *Slack v. McDaniel* in all respects. Therefore, as a practical matter the Ninth Circuit did not err in issuing the certificate even though it was issued under the former version of §2253. Accordingly, certiorari on petitioner's question No. 1 should be denied.

Respectfully submitted,



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May 1, 2000

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM JAY GOLLEHON, Petitioner-Appellant, v. MICHAEL MAHONEY, Warden Montana State Prison, Respondent-Appellee.	No. 98-99005, 98-99027 DC# CV-95-00037-CCL Montana ORDER (Filed March 1, 1999)

Before: CANBY, O'SCANNLAIN, and WARDLAW, Circuit Judges

Gollehon contends the district court erred under *Rose v. Lundy*, 455 U.S. 509 (1981), and violated his equal protection and due process rights under *Calderon v. United States Dist. Court ("Thomas")*, 144 F.3d 618 (9th Cir. 1998), when it dismissed his petition without prejudice instead of first allowing Gollehon to amend his petition to delete his unexhausted claims and then staying federal proceedings pending exhaustion of state remedies. Gollehon's contentions are debatable among jurists of reason. *See Thomas*, 144 F.3d at 620 (denying State's petition for mandamus because withdrawal and abeyance procedure is "entirely consistent with established law"); *see also Calderon v. United States Dist. Court ("Taylor")*, 134 F.3d 981, 986 (9th Cir. 1998) ("*Rose* specifically provided habeas petitioners with the option of amending their

applications to delete unexhausted claims rather than suffering a dismissal"), *cert. denied*, 119 S.Ct. 274 (1998).

The notice of appeal is construed as a request for a certificate of probable cause, and so construed, is GRANTED. *See Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); Fed. R. App. P. 22(b) (West 1996); 28 U.S.C. § 2253 (West 1996).

The Clerk shall calendar this case during the week of May 3, 1999 in Seattle.
